

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 FEB -5 P 4:41

BY RONALD R. CARPENTER

No. 82288-3


CLERK

SUPREME COURT FOR THE STATE OF WASHINGTON

CITY OF FEDERAL WAY,
Respondent,

v.

DAVID KOENIG,
Appellant

RESPONSE BRIEF OF THE CITY OF FEDERAL WAY

P. Stephen DiJulio, WSBA #7139
Ramsey Ramerman, #30423
Attorneys for Respondent
City of Federal Way
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
www.foster.com ♦ 206-447-4400

ORIGINAL - FILED BY E-MAIL ATTACHMENT

TABLE OF CONTENTS

	<i>Page</i>
1. INTRODUCTION.....	1
2. SUMMARY OF FACTS.....	2
3. SUMMARY OF ARGUMENT	4
4. ARGUMENT.....	7
4.1 Standard of Review.....	7
4.2 Under the Legislature’s Definitions in the Public Records Act, Courts Are Not “Agencies” and Court Records Are Not “Public Records.”	7
4.2.1 This Court construes the definitions of “agency” and “public record” to find that courts are not agencies and court records are not public records.....	7
4.2.2 The Legislature effectively approved and adopted this Court’s interpretation of “agency” and “public record” by repeatedly amending the PRA definitions without adding courts or court records to those definitions.	10
4.3 <i>Nast</i> Is Controlling Authority in This Case.....	12
4.3.1 This Court ruled in <i>Nast</i> that court records are not subject to the PRA.....	13
4.3.2 Koenig has not shown that <i>Nast</i> was “erroneous and harmful.”	16
4.3.3 The Legislature Did Not Overrule <i>Nast</i> When It Amended RCW 42.56.070.	16
4.3.4 <i>Nast</i> rejects the claim that this dispute should be decided on the separation of powers doctrine.	19
4.4 The Federal Way Municipal Court Is Not Subject to the PRA, Which Means It Does Not Have to Comply With the “Exemption Log” Requirement of the PRA	20

4.5	It Would Be Manifestly Unjust to Require the City to Pay Penalties or Attorney Fees	20
4.5.1	The Court should apply its ruling prospectively and not award attorney fees or penalties.....	21
4.5.2	The Court Should Exercise Its Equitable Authority to Deny Attorney Fees and Penalties.....	24
5.	CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

<i>Baker v. Leonard</i> , 120 Wn.2d 538, 843 P.2d 1050 (1993).....	11
<i>Beuhler v. Small</i> , 115 Wn. App. 914, 64 P.3d 78 (2003).....	<i>passim</i>
<i>Brandt v. Impero</i> , 1 Wn. App. 678, 463 P.2d 197 (1969).....	124
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 193 P.3d 110 (2008).....	13, 16
<i>Camaj v. SS Kresge Co.</i> , 393 N.W.2d 825 (1986).....	22
<i>Cascade Security Bank v. Butler</i> , 88 Wn.2d 777, 567 P.2d 631 (1977).....	22
<i>Dragonslayer, Inc. v. Wash. State Gambling Comm'n</i> , 139 Wn. App. 433, 161 P.3d 428 (2007).....	7, 20
<i>Friends of Snoqualmie Valley v. King County Boundary Review Bd.</i> , 118 Wn.2d 488, 825 P.2d 300 (1992).....	4, 17, 18
<i>Graffell v. Honeysuckle</i> , 30 Wn.2d 390, 191 P.2d 858 (1948).....	5
<i>In re Disciplinary Proceeding Against Haley</i> , 156 Wn.2d 324, 126 P.3d 1262 (2006).....	22
<i>In re Mercer</i> , 108 Wn.2d 714, 741 P.2d 559 (1987).....	13
<i>In re Rosier</i> , 105 Wn.2d 606, 717 P.2d 1353 (1986).....	18
<i>Indus. Coating Co. v. Fidelity & Deposit Co.</i> , 117 Wn.2d 511, 817 P.2d 393 (1991).....	25
<i>Koenig v. Des Moines</i> , 158 Wn.2d 173, 142 P.3d 162 (2006).....	24

<i>Lau v. Nelson</i> , 92 Wn.2d 823, 601 P.2d 527 (1979).....	22
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1986).....	<i>passim</i>
<i>Puget Sound Plywood, Inc. v. Mester</i> , 86 Wn.2d 135, 542 P.2d 756 (1975).....	24
<i>Progressive Animal Welfare Society v. Univ. Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1995).....	19
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	5, 13
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992).....	21
<i>Soproni v. Polygon Apartment Partners</i> , 137 Wn.2d 319 (1999).....	10
<i>Spokane & Eastern Lawyers v. Tompkins</i> , 136 Wn. App. 616, 150 P.3d 158 (2007).....	<i>passim</i>
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 16 P.3d 626 (2001).....	22
<i>State v. Ritchie</i> , 126 Wn.2d 388, 894 P.2d 1308 (1995).....	11
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	5, 11
<i>Waremart, Inc. v. Progressive Campaigns, Inc.</i> , 139 Wn.2d 623, 989 P.2d 524 (1999).....	13
<i>Washington State Farm Bureau v. Gregoire</i> , 162 Wn.2d 284 (2007).....	19
<i>West v. Port of Olympia</i> , 146 Wn. App. 108, 192 P.3d 926 (2008).....	24
<i>Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	25

STATUTES & ADMINISTRATIVE CODES

RCW 30.20.015	10
RCW 40.14.100	11

RCW 42.17.020	4
RCW 42.17.260	16
RCW 42.56.020	4
RCW 42.56.070	11, 16, 20
RCW 42.56.540	3
WAC 44-14-01001.....	14, 22

1. INTRODUCTION

For over two decades, courts and court records have been exempt under Washington law from the Public Records Act ("PRA")¹. This followed from the Supreme Court's 1986 decision, *Nast v. Michels*² where the Court held that the King County Court was not an "agency" subject to the PRA and its case files were not "public records." The Legislature concurred in the Court's interpretation of these definitions of "agency" and "public record" by not amending those definitions to include courts and court records, despite having at least nine separate opportunities to amend the statute that contained those definitions. The courts of appeal also reaffirmed the *Nast* ruling when they revisited the question on two occasions, both times ruling that courts are not agencies and all court records are not public records.³

In light of this uniform and unquestioned precedent, the trial court properly ruled that the records of the Federal Way Municipal Court are not subject to the PRA. This Court should affirm.

¹ The public records statutes were re-codified in 2006 as the Public Records Act. Prior to 2006, the statutes were located in the Public Disclosure Act ("PDA"). For consistence, references from pre-2006 decisions to the PDA have been changed to the PRA.

² *Nast v. Michels*, 107 Wn.2d 300, 304-05, 730 P.2d 54 (1986).

³ *Spokane & Eastern Lawyers v. Tompkins*, 136 Wn. App. 616, 622, 150 P.3d 158 (2007); *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003).

2. SUMMARY OF FACTS

On February 17, 2008, Petitioner Koenig submitted a public records request to the City for, in part, Judge Michael Morgan's correspondence on a particular issue.⁴ Judge Michael Morgan is an elected judge and Presiding Judge of the Federal Way Municipal Court.⁵ Judge Morgan's correspondence subject to Koenig's public records request are records belonging to the Federal Way Court.⁶

On February 27, 2008, when producing the documents responsive to other portions of Koenig's request, the City attorney informed Koenig that the Federal Way Court was not subject to the PRA, and thus the City would not produce the requested Morgan correspondence.⁷ In letters dated March 18 and May 20, Koenig informed the City that he did not agree that *Nast*, as well as decisions from Division II and Division III, were controlling or properly decided.⁸

After the City informed Koenig that it might seek court guidance in this issue, Koenig specifically requested that he be joined in any such

⁴ CP 10 (first Koenig request).

⁵ CP 7, ¶3 (Richardson Dec.).

⁶ CP 8, ¶4 (Richardson Dec.).

⁷ CP 12-13 (City's first response).

⁸ CP 15-18 (two Koenig letters challenging *Nast*).

suit.⁹ Accordingly, the City has filed this suit seeking guidance from the court.¹⁰

Koenig responded by making a new public records request for additional court records, and then filing counterclaims.¹¹ Both parties then moved for a judicial determination.¹² The City argued that *Nast* was controlling authority.¹³ Koenig argued that *Nast* was wrongly decided and that none of the justices that decided *Nast* were still on the Supreme Court.¹⁴ The trial court entered the permanent injunction providing that the City does not need to produce court records, and dismissing Koenig's counterclaims.¹⁵ Koenig appealed directly to this Court.¹⁶

⁹ CP 18 ("as an interested party, I would expect to be advised of your action and joined with your suit.").

¹⁰ CP 3-6 (Petition).

¹¹ CP 79-82 (second request); CP 64-65 (counterclaims).

¹² The City sought a permanent injunction pursuant to RCW 42.56.540. CP 19-25. Koenig moved for summary judgment. CP 28-45. Because this case turns solely on a question of law, this Court needs to determine the exact manner the issue was brought before the Court.

¹³ E.g., CP 20 (City's motion).

¹⁴ E.g., CP 34-36 (Koenig's summary judgment motion), CP 37:15-18.

¹⁵ CP 101-02 (final order).

¹⁶ CP 104 (notice of appeal).

3. SUMMARY OF ARGUMENT

In the Supreme Court's 1986 *Nast v. Michels*¹⁷ decision, this Court holds that the statutory definition of "agency" in the Public Disclosure Act did not include courts and the definition of "public records" did not include court records.¹⁸ Between 1986 and 2007, the Washington Legislature – presumed to be familiar with this holding – amended the definitional statute in the Public Disclosure Act eight times, but did not amend the definitions of "agency" and "public record" to include courts and court records.¹⁹ Then in 2007, the Legislature adopted these identical definitions as part of the recodified Public Records Act. Again, the Legislature chose not to add courts to the definition of agency or court records to the definition of public records.²⁰

The Legislature's repeated decision to not amend the two definitions this Court interpreted in *Nast* is legislative acquiescence to the definitions adopted by this Court.²¹ Under the separation of powers

¹⁷ *Nast v. Michels*, 107 Wn.2d 300, 304-05, 730 P.2d 54 (1986).

¹⁸ As noted, the Public Disclosure Act ("PDA") has now been recodified as the PRA. The definitions of "agency" and "public record" appeared in RCW 42.17.020 until they were added to the PRA in 2007 at RCW 42.56.010.

¹⁹ Laws of 2005, Ch. 445 § 6; Laws of 2002, Ch. 75 § 1; Laws of 1995, Ch. 397 § 1; Laws of 1992, Ch. 139 § 1; Laws of 1991, sp.s. Ch. 18 § 1; Laws of 1990, Ch. 139 § 2; prior: Laws of 1989, Ch. 280 § 1; Laws of 1989, Ch. 175 § 89.

²⁰ Laws of 2007, Ch. 197 § 1.

²¹ *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992).

doctrine, when this Court is tasked to interpret legislation – as this Court must do in this case – the Court’s duty is to ascertain the legislative intent and give that intent effect.²² Here, the Legislature agreed with this Court’s interpretation of “agency” and “public record” in *Nast* and has made that interpretation its own by repeatedly re-enacting these definitions without amending them to include the courts. This Court is accordingly bound not only by *stare decisis*,²³ but by the Legislature’s decision.

Koenig has made a public records request for court records held by the City of Federal Way’s (“City”) municipal court. Under the definitions of “agency” and “public records” first interpreted in *Nast* and then adopted by the Legislature through acquiescence, that court and its records are not subject to the Public Records Act. Accordingly, the municipal court has not violated the PRA by not turning over its records. This Court should affirm the trial court.

²² See, e.g., *State v. Roggenkamp*, 153 Wn.2d 614, 629-30, 106 P.3d 196 (2005) (“Because the legislature has acquiesced in this court’s definition of ‘in a reckless manner,’ we will not alter our interpretation of that term until the legislature provides a different definition.”); *Graffell v. Honeysuckle*, 30 Wn.2d 390, 401, 191 P.2d 858 (1948) (“The legislature had the right to enact the new law, and our function is to ascertain the intention of the legislature in enacting it and, having ascertained the intention, to give it effect.”). (Note – Westlaw version of this case is missing the second “the” – which appears in the official reporter.)

²³ E.g., *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (“The doctrine of *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned.”).

Finally, should this Court overrule its decision in *Nast*, the Court should apply the decision prospectively or use its equitable powers and rule that penalties and attorney fees are not warranted. After Mr. Koenig indicated that he felt *Nast* was wrongly decided, the City took the proactive step of seeking a prompt court decision. Relying on *Nast*, the trial court agreed with the City and held that the Federal Way Municipal Court was not subject to the PRA. Under these circumstances, it would be manifestly unjust (and not further the goals of the PRA) to penalize the taxpaying citizens of the City of Federal Way by imposing penalties and attorney fees simply because the City sought to comply with the PRA by following this Court's prior holding in *Nast*. Koenig would still be able to get the records he seeks simply by making a new request.

4. ARGUMENT

4.1 Standard of Review

This case involves a legal question, and is thus subject to de novo review.²⁴

4.2 Under the Legislature's Definitions in the Public Records Act, Courts Are Not "Agencies" and Court Records Are Not "Public Records."

After this Court adopted narrow definitions to the terms "agency" and "public record" in *Nast*, the Legislature repeatedly reenacted those definitions without adding courts or court records. This Court is bound by those legislative enactments and must find that the Federal Way Municipal Court is not an "agency" and therefore all of its records are not "public records."

4.2.1 This Court construes the definitions of "agency" and "public record" to find that courts are not agencies and court records are not public records.

In *Nast*, this Court first carefully laid out the definitions of "agency" and "public record." It then concluded that because these

²⁴ While there are no facts at issue, it is worth noting that this case does not involve the application of any exemption. Instead, Koenig is in effect seeking a declaratory judgment that the Federal Way Municipal Court is subject to the PRA. As a party claiming that an entity is subject to the PRA, the burden of proof in this case rests on Koenig to prove that the PRA applies in the first instance to the Federal Way Municipal Court and that the Municipal Court records sought are public records as defined in the PRA. See *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 441, 161 P.3d 428 (2007) ("Once the threshold inquiry of whether a document is a 'public record' is met, then the burden to prove that an exemption applies is properly placed on the party seeking to prevent disclosure.") It is only when an agency is subject to the PRA that the burden shifts to the party opposing disclosure to demonstrate that the records are exempt. *Dragonslayer*, 139 Wn. App. at 441.

“definitions do not specifically include either courts or case files” the Legislature did not intend courts or case files to be “within the realm of the [PRA].” *Nast*, 107 Wn.2d at 305-06.

This interpretation of the definitions in the PRA was central to the Court’s ruling in *Nast*. Technically, the records at issue were in the possession of the Department of Judicial Administration, which on its face would qualify as an agency. In *Nast*, King County had argued that courts were exempt based on the constitutional “separation of powers” argument. However, this Court instead relied on the PRA’s definitions to support its holding.²⁵ Those definitions, and the interpretation of those definitions, remain consistent today.

Division II and Division III of the Court of Appeals have both recognized that *Nast* was based on this Court’s interpretation of the definitions of “agency” and “public record.” *Spokane & Eastern Lawyers v. Tompkins*, 136 Wn. App. 616, 622, 150 P.3d 158 (2007); *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003).

Even Koenig conceded in his opening brief before the trial court that *Nast* was based on the “the court’s determination that the PRA did not specifically include court or case files . . . based on a narrow interpretation

²⁵ CP 89:16-20; see also King County’s Brief of Appellant at 19-21, in *Nast v. Michaels*, (on file with this Court).

of the terms 'agency' and 'public record.'"²⁶ It was only after the City relied on the doctrine of legislative acquiescence that Koenig took the position he now asserts on appeal, that *Nast* did not interpret the terms "agency" and "public record."²⁷ The trial court, as did the courts of appeal, had no difficulty rejecting this position.

And even on appeal, Koenig cannot fully avoid the fact that this Court did narrowly interpret "agency" and "public record" as the basis for the holding in *Nast*. On page 12 of his opening brief to this Court, Koenig states, "the *Nast* court's determination that the PRA did not specifically include courts or case files **was based on a narrow interpretation of the terms 'agency' and 'public record.'**"²⁸ Koenig then argues, inconsistently, to avoid the doctrine of legislative acquiescence by the Court "never expressly concluded that courts are not 'agencies' or that court records are not 'public records.'"²⁹ But his initial concession is controlling. Even Koenig concedes that it was the Court's interpretation of those terms that is the foundation of the holding in *Nast*.

²⁶ E.g., CP 35:7-8; see also CP 35:15-17 (noting "the definition of agency [was] construed narrowly.").

²⁷ CP 87-88 (City's argument on legislative acquiescence); CP 98-99 (Koenig's response, arguing for the first time that the *Nast* court did not interpret PRA terms).

²⁸ Br. of Appellant at 12 (emphasis supplied).

²⁹ Br. of Appellant at 13.

In *Nast*, the Court holds that courts and case files are not subject to the PRA. The Court did not rely on the constitutional separation of powers doctrine to reach this conclusion – thus the only way the Court could have reached the holding was to conclude that the Legislature did not intend the Court and its records to be subject to the PRA. The Legislature has now, by repeated acquiescence, adopted the Court’s narrow definition of “agency” and “public record” and this Court is bound by those definitions.

4.2.2 The Legislature effectively approved and adopted this Court’s interpretation of “agency” and “public record” by repeatedly amending the PRA definitions without adding courts or court records to those definitions.

“The Legislature is presumed to be familiar with the prevailing judicial interpretations of a statute when it amends the statute.”³⁰ “Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction.” *Baker*, 120 Wn.2d at 545; *Ritchie*, 126 Wn.2d at 393. Thus, in *Baker*, the Court held that because the Legislature had amended RCW 30.20.015 after the Court had interpreted it, but had not changed the language at issue in *Baker*, the Legislature was presumed to have

³⁰ *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993); see also, e.g., *State v. Roggenkamp*, 153 Wn.2d 614, 629-30, 106 P.3d 196 (2005); *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995); *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327, n.3, 971 P.2d 500 (1999).

acquiesced to the Court's prior interpretation. *Baker*, 120 Wn.2d at 545. The same was true in *Ritchie* and *Roggenkamp*, where this Court found that the Legislature's subsequent conduct was conclusive on the meaning of the terms at issue in those cases. *Roggenkamp*, 153 Wn.2d at 629-30; *Ritchie*, 126 Wn.2d at 393.

Here, the Legislature has unambiguously acquiesced to this Court's interpretation of "agency" and "public record" in *Nast*. Since *Nast*, the Legislature has amended the definitional section of the PDA eight times,³¹ including once in 1995, when it amended the definition of "public record." Laws of 1995 c 397 § 1 (exempting the legislative records from the definition of "public record" by adding the definition of "legislative record" found in RCW 40.14.100, which excludes most legislative records). The Legislature then adopted those identical definitions for "agency" and "public record" in 2007, when it added the definitions to the recodified PRA. Laws of 2007, Ch. 197, § 1.

The Legislature is presumed to be aware of this Court's holding in *Nast* excluding courts and court records from the definitions of "agency" and "public record." If the Legislature had wanted to include courts and court records in those definitions, it would have done so on one of its nine

³¹ Laws of 2005, Ch. 445 § 6; Laws of 2002, Ch. 75 § 1; Laws of 1995, Ch. 397 § 1; Laws of 1992, Ch. 139 § 1; Laws of 1991, sp.s. Ch. 18 § 1; Laws of 1990, Ch. 139 § 2; prior: Laws of 1989, Ch. 280 § 1; Laws of 1989, Ch. 175 § 89.

opportunities. But it did not. And this Court is bound to follow the Legislature's decision.

While *Nast* only addressed case files, and not all court records, its holding serves to exclude all court records from the PRA. The PRA only imposed duties on "agencies." RCW 42.56.070(1). Because *Nast* concluded courts are not agencies, courts have no duty to provide public records under the PRA. This is the conclusion reached by Division II and Division III in the *Spokane Eastern Lawyers*³² and *Buehler*³³ cases. Those cases held that judicial correspondence and judges' working files were not subject to the PRA. So here, the municipal court's internal files are not subject to the PRA.

4.3 *Nast* Is Controlling Authority in This Case

Even if the Legislature had not adopted the holding in *Nast* when it repeatedly re-enacted the definitions of "agency" and "public record" without adding courts or court records, *Nast* remains binding precedent. Under the doctrine of *stare decisis*, this Court should uphold its ruling because there has been no "clear showing that an established rule is incorrect and harmful." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004); *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139

³² *Spokane & Eastern Lawyers v. Tompkins*, 136 Wn. App. 616, 622, 150 P.3d 158 (2007).

³³ *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003).

Wn.2d 623, 634, 989 P.2d 524 (1999). The doctrine of *stare decisis* plays a fundamental role in our justice system, by “provid[ing] rules by which people may guide their conduct in society.” *In re Mercer*, 108 Wn.2d 714, 720, 741 P.2d 559 (1987). “Without the stabilizing effect of [*stare decisis*], law could become subject to incautious action or the whims of current holders of judicial office.”³⁴ *Mercer*, 108 Wn.2d at 720.

The “incorrect and harmful” showing cannot be made by “reargue[ing] the same arguments that were thoroughly considered and decided” by the original court. *Brutsche v. City of Kent*, 164 Wn.2d 664, 682, 193 P.3d 110 (2008).

4.3.1 This Court ruled in *Nast* that court records are not subject to the PRA.

This Court, Division II and Division III have all ruled that court records are not subject to the PRA. In *Nast* the Supreme Court framed the issue as “whether the judiciary and its case files are under the realm of the [PRA].” *Nast*, 107 Wn.2d at 306. The Court determined that court records were not subject to the PRA.³⁵ *Nast*, 107 Wn.2d at 304. In reaching this conclusion, the Court specifically held that records belonging to the Department of Judicial Administration were treated the same as

³⁴ Below, Koenig emphasized that “None of the original *Nast* Court is still on the bench today[.]” CP 37:16-17. If that was a legitimate consideration when determining whether *stare decisis* applied, litigants truly would be at the whims the current Justices.

³⁵ While court case files are not subject to the PRA, the common law already provides for broad public access to these case files. *Nast*, 107 Wn.2d at 303.

court records, not subject to the Act. *Nast*, 107 Wn.2d at 305. It reached its holding, in part, because subjecting courts to the PRA would impose an “onerous burden” on court clerks and “undo[] all of the developed law protecting privacy and governmental interests.” *Nast*, 107 Wn.2d at 307.

Although the request at issue in *Nast* was for court case files, Division II and Division III have both recognized that the holding in *Nast* applies to all court records, including court administrative records; the holding was not limited to court case files. *Spokane & Eastern*, 136 Wn. App. at 622; *Beuhler*, 115 Wn. App. at 918, (citing *Nast*). The Washington State Attorney General has also noted that *Nast* provides that “Court files and judge’s files are not subject to the act.” Public Records Act – Model Rules, WAC 44-14-01001 (citing *Nast*).

In applying the *Nast* ruling to all court records, not just case files, Division II rejected the argument that *Nast*’s reference to the Department of Judicial Administration and the judiciary as a whole were *dicta*. The Supreme Court in *Nast* could have resolved the case on the narrow ground that the PRA did not apply to case files because there was already common law access to those case files. *Spokane & Eastern*, 136 Wn. App. at 621. But instead, *Nast* specifically exempted records of the Department of Judicial Administration because it was a “unique institution” that served the judiciary. *Spokane & Eastern*, 136 Wn. App.

at 621. "This discussion would have been unnecessary if the court had focused only on whether court files were subject to the [PRA]." *Spokane & Eastern*, 136 Wn. App. at 621. Division II also noted that the dissent in *Nast* expressly recognized the majority's broad holding that all court records are not subject to the PRA. *Spokane & Eastern*, 136 Wn. App. at 621 n.4 (quoting *Nast* dissent). Thus Division II held that correspondence from a judge was not subject to the PRA. *Spokane & Eastern*, 136 Wn. App. at 622.

Previously, Division III had similarly recognized the broad scope of the *Nast* holding. In *Beuhler*, the Court held that a judge's personal files used for sentencing were not subject to the PRA because "the Washington Supreme Court held that . . . neither courts nor court case files are specifically included in the [PRA] and are not within its realm." *Beuhler*, 115 Wn. App. at 918 (citing *Nast*).

The records Koenig has requested are court records, exempt from the PRA under *Nast*, *Spokane & Eastern* and *Beuhler*. Koenig has not offered any justification for this Court not abiding by its prior decision in *Nast* and the well-reasoned opinions by Division I and Division II.

4.3.2 Koenig has not shown that *Nast* was “erroneous and harmful.”

Koenig arguments as to why *Nast* was “wrongly decided” are unsupported; and, do not demonstrate an “erroneous” or “wrongful decision” by the court.

His first two arguments were the primary arguments asserted by the dissent in *Nast* but rejected by the majority. See *Nast*, 107 Wn.2d at 312-313 (Durham, J. dissenting). Koenig cannot overcome *stare decisis* by “reargue[ing] the same arguments that were thoroughly considered and decided” by the *Nast* majority. *Brutsche*, 164 Wn.2d at 682. His third argument is a misapplication of clear legislative enactments.

4.3.3 The Legislature Did Not Overrule *Nast* When It Amended RCW 42.56.070.

When the Legislature enacted Laws of 1987, Ch. 403 amending RCW 42.56.070(1),³⁶ it did not intend to overrule *Nast*. Had it done so, it would have specifically amended the definitions of “agency” and “public records” in the PRA.

Koenig’s argument is similar to the argument the Supreme Court rejected in *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 825 P.2d 300 (1992). In that case, the plaintiffs

³⁶ The bill actually amended former RCW 42.17.260(1), which was recodified in 2005 as RCW 42.56.070.

sought to appeal an annexation decision to the courts. The plaintiffs lived outside of the annexed area, and an earlier Supreme Court decision stated that residents outside of the annexed area lacked standing to challenge the annexation decision in the courts. After that earlier opinion, the Legislature amended the annexation statutes to expand the rights of residents outside of the annexed area. But the Legislature did not amend the specific statute that the Supreme Court had applied in denying standing, or grant standing in the new legislation. Nevertheless, the plaintiffs asserted that the amendment expanding property owner rights demonstrated a legislative intent to overrule the prior Supreme Court decision. *Friends*, 118 Wn.2d at 495-96.

The Supreme Court rejected such an **overruled-by-inference** argument, holding that there must be a “**clear legislative intent**” to change the law. *Friends*, 118 Wn.2d at 496-97. The Legislature is presumed to be aware of the earlier court ruling. It could have expressed its intent by “expressly amend[ing]” the statute that the Court had previously interpreted to deny standing. *Friends*, 118 Wn.2d at 496-97. The Legislature did not, and thus the Court refused to imply that the Legislature was seeking to overrule the prior decision. *Friends*, 118 Wn.2d at 496-97.

Here, like in *Friends*, if the Legislature had wished to overrule *Nast*, it would have simply amended the definitional sections of the PRA to include the courts and court records. But instead, it chose (on multiple occasions) to leave those definitional sections intact after *Nast*, demonstrating as a matter of law that the Legislature agreed with the *Nast* Court's interpretation.

Further, the Legislature's intent in the 1987 enactment is no mystery because the law itself explains its intent – to overrule a separate PRA decision, *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). In *Rosier*, the Court recognized an implied exemption for personal privacy. *Rosier*, 105 Wn.2d at 609-610. Laws of 1982, Ch. 403 was the Legislature's response to *Rosier*, not *Nast*. The Legislature specifically expressed its "intent" and stated it was seeking to overrule *Rosier*; there is no mention of *Nast*. "The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in '*In Re Rosier*,' 105 Wn.2d 606 (1986)." Laws of 1987, Ch. 403, § 1. The Legislature's intent section further makes evident that the purpose of the amendments is to "to make clear that: . . . agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records." Laws of 1987, Ch. 403, § 1; *see also Progressive Animal Welfare Society*

v. Univ. Wash., 125 Wn.2d 243, 257-60, 884 P.2d 592 (1995) (discussing the Legislature's intent in enacting Laws of 1987, Ch. 403); 1998 AGO No. 12 (discussing intent of the 1987 legislation). The courts and the attorney general have uniformly found the purpose of that 1987 legislation was **not** to overrule or limit the holding in *Nast*. Thus, *Nast* remains binding precedent.

4.3.4 *Nast* rejects the claim that this dispute should be decided on the separation of powers doctrine.

In *Nast*, King County made the separation of powers argument, which the Supreme Court elected not to apply.³⁷ Instead of addressing the constitutional issue,³⁸ the Court based its decision on the statute and the definitional sections of the PRA. The Court interpreted those sections to exclude courts and court records from the definitions of “agency” and “public record.” Koenig cannot sidestep that binding authority by relying on the separation of powers doctrine that the Supreme Court in *Nast* determined it did not need to address to resolve that case. The PRA, alone, is all of the authority that is needed to resolve this case. The PRA does not cover courts or court records.

³⁷ CP 89:16-20; see also King County's Brief of Appellant at 19-21, in *Nast v. Michaels*, (on file with this Court).

³⁸ It is not surprising that the Court would have elected not to address the constitutional separation of powers argument, given that courts – including this Court – avoid addressing constitutional issues when a case can be resolved on other grounds. See *Washington State Farm Bureau v. Gregoire*, 162 Wn.2d 284, 291 n.7, 174 P.3d 1142 (2007).

**4.4 The Federal Way Municipal Court Is Not Subject to the PRA,
Which Means It Does Not Have to Comply With the
“Exemption Log” Requirement of the PRA**

As in any lawsuit arising under the PRA, the Court is to make a preliminary determination about whether the PRA applies to the Federal Way Municipal Court. *Dragonslayer*, 139 Wn. App. at 441. If the PRA does not apply, then no further efforts or process are mandated. This means that the Municipal Court’s records are not “public records” subject to the requirements of the PRA. *Nast*, 107 Wn.2d at 307. It also means that procedural requirements of the PRA do not apply, including the requirement of RCW 42.56.070(1) to create a log of withheld “public records.” See *Nast*, 107 Wn.2d at 308 (holding that because courts are not subject to the PRA, the PRA’s requirements for making documents “promptly available” and its limitations on copying charges do not apply). Accordingly, the City was not required to provide a log of the court records it was not producing.

**4.5 It Would Be Manifestly Unjust to Require the City to Pay
Penalties or Attorney Fees**

If this Court rules that courts are subject to the PRA, it would be manifestly unjust to require the taxpayers of Federal Way to pay attorney fees or penalties. The City followed unambiguous and clear precedent from this Court and courts of appeals. Under these circumstances, the purposes of the PRA would not be furthered by punishing the City’s

taxpayers in light of the prior case law. To avoid punishing the City's taxpayers, the Court should either apply its ruling prospectively only, or use its equitable powers to deny fees and penalties.

4.5.1 The Court should apply its ruling prospectively and not award attorney fees or penalties.

An appellate court's decision can apply retroactively, which means it applies to the litigants in the case and all non-final decisions, or it can apply prospectively, meaning it only applies to future actions and does not apply to the parties in the case. *Robinson v. City of Seattle*, 119 Wn.2d 34, 74-75, 830 P.2d 318 (1992) (describing options and abolishing third category, where decision would be applied to the litigants in the case, but not to other similarly situated litigants with non-final decisions).

While retroactive application of opinions is the norm, Courts will apply opinions prospectively to serve equity based on the consideration of three factors: (1) whether the decision establishes a new rule of law by overruling clear past precedent not clearly foreshadowed by prior opinions; (2) whether retroactive application would further or retard the purposes of the new rule; and (3) whether retroactive application would be inequitable. *State v. Atsbeha*, 142 Wn.2d 904, 916, 16 P.3d 626 (2001); *see also, e.g., In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 338, 126 P.3d 1262 (2006) (holding new interpretation of disciplinary

rule would only be applied prospectively; dismissing charge against lawyer); *Lau v. Nelson*, 92 Wn.2d 823, 827-29, 601 P.2d 527 (1979) (applying new ruling prospectively only); *Camaj v. SS Kresge Co.*, 393 N.W.2d 825 (1986) (holding that court's new interpretation of statute would be applied prospectively).

For example, in *Cascade Security Bank v. Butler*, 88 Wn.2d 777, 784-85, 567 P.2d 631 (1977), this Court overruled a prior decision. It ruled that its decision would only apply prospectively, and not to the parties before the court. In doing so, the court noted that retroactive application "may result in substantial hardship to the parties who have relied in good faith on the rule." *Cascade*, 88 Wn.2d at 784. "Prospective application minimizes or eliminates the hardships of an overruled decision." *Cascade*, 88 Wn.2d at 785.

Here, the Court's three factors weigh strongly in applying prospectively any new ruling. First, if this Court rules that courts are subject to the PRA, this will require the Court to issue a new rule of law that overrules clear precedent. Not only would the Court have to overrule *Nast*, but it would also have to overrule *Spokane & Eastern* and *Beuhler*. It would also directly contradict the Model Public Records rules issued by the Attorney General. See WAC 44-14-01001. Thus, the first factor weighs strongly in favor of prospective application.

Second, while retroactive application would not harm the goals of the PRA, prospective application would not either. This is because, if this Court rules that courts are subject to the PRA, Koenig can simply make a new, identical request and will be able to obtain the responsive records. Thus, this second factor is, at best, neutral.

Third, retroactive application would be extremely inequitable to the City of Federal Way and its taxpayers. The City denied the public records request and sought a judicial determination based on unambiguous appellate decisions that held courts were not subject to the PRA.³⁹ Even if this Court were to find that *Nast* was a narrow decision that only applied to case files, the City in good faith relied on the broader interpretations of *Nast* in *Spokane & Eastern* and *Beuhler*. The City only sought court review after Koenig asserted that *Nast* was wrongly decided and would not be affirmed⁴⁰ and asked to be included if the City sought judicial review.⁴¹ Koenig has a well-known history of filing PRA suits. *See, e.g., Koenig v. Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006); *West v. Port of Olympia*, 146 Wn. App. 108, 192 P.3d 926 (2008). Under these circumstances, it would be manifestly unjust to force the taxpayers of

³⁹ CP 52-53 (City's final denial letter).

⁴⁰ CP 15-18 (Koenig's two letters challenging *Nast*).

⁴¹ CP 18 ("as an interested party, I would expect to be advised of your action and joined with your suit").

Federal Way to pay for daily penalties from the date of the request and for attorney fees.

The Court's three factors weigh strongly in favor of prospective application of any new ruling. The PRA's goal of transparency and open government would be fully protected by prospective application because Koenig can simply resubmit his public records request. On the other hand, taxpayers of Federal Way would be unfairly punished if any new ruling was applied retroactively.

4.5.2 The Court Should Exercise Its Equitable Authority to Deny Attorney Fees and Penalties.

Even if the Court applies a new decision retroactively, it should still use its equitable authority and not award attorney fees or penalties. When attorney fees are allowed by statute, this Court "has the inherent jurisdiction" to set the amount of fees. *See, e.g., Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 144, 542 P.2d 756 (1975); *Brandt v. Impero*, 1 Wn. App. 678, 683, 463 P.2d 197 (1969). This Court also had the authority to deny fees, even if permitted by statute, as demonstrated by RAP 18.1 (requiring party seeking fees to devote separate sections of brief to fee request); *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710, 952 P.2d 590 (1998) (denying fees based on the failure to comply with RAP 18.1); *Indus. Coating Co. v. Fidelity & Deposit Co.*,

117 Wn.2d 511, 520, 817 P.2d 393 (1991) (denying statutory right to fee based on failure to comply with RAP 18.1).

Finally, this Court's Rules of Appellate Procedure should be "liberally interpreted to promote justice." RAP 1.2.

Here, if this Court overturns *Nast* and reverses the trial court, it would be manifestly unjust to the taxpayers of Federal Way to impose penalties or require the City to pay attorney fees. The City, when faced with a public records request for records clearly exempt based on *Nast* and two other appellate decisions, denied the request. When the requester objected and claimed *Nast* was not good law,⁴² the City took the responsible step of promptly seeking judicial review. Under these circumstances, it would not further the purposes of the PRA to impose penalties or award attorney fees.

Therefore, if this Court reverses, the City asks the Court to exercise its equitable powers and rule that no fees or penalties should be imposed on remand or for this appeal.

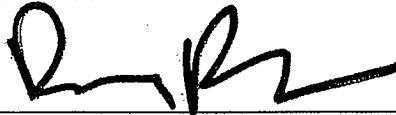
⁴² CP 15-18 (two Koenig letters challenging *Nast*).

5. CONCLUSION

This case does not require the Court to address policy issues – instead it is a simple case of statutory construction. Has the Legislature, through its silence, adopted this Court’s narrow definitions of agency and public record that exclude courts and court records? The Legislature had nine opportunities to amend the statutes that contain controlling definitions. And each time the Legislature elected not to amend the PRA definitions to include courts and court records. This legislative history includes two occasions when the PRA definitions of “agency” and “public record” were amended or re-adopted. Based on this legislative history, the Legislature’s intent is unambiguous. Courts are not agencies and court records are not public records. Under its prior decision and that legislative determination, the Court should accordingly affirm the trial court.

RESPECTFULLY SUBMITTED this 5th day of February, 2009.

FOSTER PEPPER PLLC



P. Stephen DiJulio, WSBA No. 7139
Ramsey Ramerman, WSBA No. 30423
Special Deputy City Attorneys for the City
of Federal Way